

ERIC C. CARLSON

IBLA 93-622

Decided November 4, 1997

Appeal of a decision of the Canon City District Manager, Bureau of Land Management, granting a right-of-way for an access road across public lands. COC-54319.

Decision set aside and case referred for hearing.

1. Administrative Procedure: Adjudication--Rights-of-Way:
Generally--Rights-of-Way: Applications

A decision to grant a right-of-way application in the discretion of BLM is properly set aside and referred for a hearing when the BLM decision fails to reflect any analysis of relevant factors to determine what is required in the public interest, and the right-of-way is granted to third parties with substantial question whether there was any consideration for a buyer whose signed purchase agreement contained no mention of this encumbrance.

2. Appraisals--Federal Land Policy Management Act of 1976:
Exchanges

Where the buyer in a land exchange receives the land encumbered by a right-of-way grant by BLM without the buyer's knowledge after an agreement had been signed with seller, the right-of-way grant will be set aside.

APPEARANCES: Bryan T. Fredrickson, Esq., Canon City, Colorado, for Appellant; Lowell L. Madsen, Esq., Assistant Regional Solicitor, Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Eric Carlson filed a timely appeal from a July 12, 1993, Decision by the District Manager, Canon City (Colorado) District Office, Bureau of Land Management (BLM), awarding right-of-way grant COC-54319 for an

access road over a 40-acre parcel in Fremont County, Colorado, designated as T. 49 N., R. 12 E., sec. 18, NW~~4~~¹/₄NE~~4~~¹/₄, New Mexico Principal Meridian, to Kurt Etscheidt and Eunice E. Taylor, owners of land contiguous to the subject parcel. Appellant also owns land contiguous to the subject parcel and, at the time the right-of-way issued, had tendered the full purchase price of \$19,856.98 for the parcel, pursuant to a BLM land exchange authorized under section 206 of the Federal Land Policy and Management Act (FLPMA) of October 21, 1976, as amended, 43 U.S.C. §§ 1701, 1716 (1994). 1/

In his Statement of Reasons on appeal (SOR), Appellant claims a right-of-interest in the subject land parcel that supersedes that of the right-of-way holders and asserts that BLM breached a purchase agreement to convey the subject parcel to him by patent, unencumbered by the right-of-way. Appellant asserts that the right-of-way, issued for a term of 30 years, was granted to holders Etscheidt and Taylor without prior timely notice to him on July 12, 1993, 8 days before the parcel was transferred by patent to him, pursuant to the land exchange. Appellant further argues that encumbering the parcel with the right-of-way, after the parcel had been selected and appraised as a part of the land exchange and after he had executed a purchase agreement and had tendered payment based on the appraisal, has deprived him of the property values he bargained for. Appellant seeks cancellation of the subject right-of-way and offers to negotiate, for proper monetary consideration, an alternative easement with the holders for the purposes of ingress and egress to their properties. (SOR at 4.)

In the instant case, the record shows that, pursuant to a BLM Notice of Realty Action (NORA) published in the Federal Register on January 24, 1992, Appellant executed a purchase agreement, including payment of \$2,000 in earnest money, on January 26, 1992, for the 40-acre parcel identified as T. 49 N., R. 12 E., sec. 18 NW~~4~~¹/₄NE~~4~~¹/₄, New Mexico Principal Meridian. (SOR, Exhibit B.) The record also shows that on July 8, 1993, Appellant, pursuant to an appraisal approved by the Chief State Appraiser on June 18, 1993, 2/ tendered the outstanding balance due on the purchase price of the subject parcel to the escrow agent responsible for aggregating purchase money paid for BLM selected lands in the "Currant Creek Land Exchange,"

1/ The 40-acre parcel for which Appellant tendered the requested purchase money was included in the "Currant Creek Land Exchange," COC-53540. In this transaction, BLM exchanged 889.63 acres of public lands in Park, Fremont, Chaffee, and Custer Counties, Colorado, for 1,280 acres of privately owned land, known as a part of the Currant Creek Ranch, in Park County, Colorado. The 889.63 acres patented out of public ownership were awarded to 14 patentees.

2/ See COC 53540 FD, Appraisal Report, Shepard and Associates Exchange, Fremont County Selected Parcels, COC-53540, by Deborah Hoback, May 27, 1993, approved June 10, 1993, Al Wagner, Jr., Chief State Appraiser, at 38.

COC-53540. (SOR at 5.) On July 12, 1993, BLM issued a 30-year right-of-way grant for an access road across the subject parcel to Kurt Etscheidt and Eunice Taylor. The access road traversed the 40-acre parcel from northwest to southeast and is described in right-of-way grant COC-54319 as "20 feet wide, 1400 feet long and containing .64 acres, more or less." (SOR at 5.) On July 20, 1993, Appellant took fee simple title to the subject parcel by patent No. 05-93-0038, issued by the BLM, acting for the United States Government. (BLM exchange file 1, COC-53540.) Patent No. 05-93-0038 was issued subject to right-of-way COC-54319 issued to Kurt Etscheidt and Eunice Taylor on July 12, 1993. Appellant asserts that he took patent to the parcel despite his objection to the encumbrance presented by right-of-way COC-54319 because a BLM official

informed my wife that there was nothing at all that we could do, and even if we were to prevent closing and delay until a later date, no changes would be made, regardless of any legal petitioning we might attempt. * * * I decided to continue with the closure under duress, since I had no faith in being able to purchase the land at a later date.

(SOR, Exhibit A, at 2.)

The case also includes an undated statement identified as submitted by Kurt Etscheidt and Eunice Taylor, owners of land contiguous to the BLM parcel sought by Appellant in the multi-party land exchange with BLM. ^{3/} The Etscheidt and Taylor statement reads, in pertinent part, as follows:

Taylor called the B.L.M. and found out [Carlson] had applied to buy the land. Taylor then called [Carlson] and asked if he bought the B.L.M. 40 acres if he would give her access. He was not agreeable and said emphatically NO. * * *

The Etscheidts need access because the existing easement to their property can become impassable in the winter. Because of the steepness and the up and down lay of the land the snow can set in and drifts up to 5 feet deep makeing [sic] it impassable.

^{3/} The undated Etscheidt and Taylor statement asserting their reasons for seeking a right-of-way across the BLM parcel was included in the transmittal of COC-53540, the BLM file on the land exchange that included the land patented to Appellant in patent No. 05-93-0038, as well as accompanying reports on lands appraised and exchanged. File COC-53540, which had been requested by the Board for use in its review and adjudication of the Carlson case, was received from BLM on Sept. 12, 1996.

The Etscheidt and Taylor statement was in a packet of 5 pages, stapled together, found with the requested file. A note on the second page of the packet stated that the pages should have been included in case file C-54319. The original case file did not contain these materials, and there was no evidence that copies had been served on Appellant.

Taylor needs access because she is land locked. Etscheidt and Taylor then went to B.L.M. and applied for a right of way [sic] grant. On [O]ctober 5, 1992 [E]tscheidt and [T]aylor in good faith paid B.L.M. the required fee of money. O[n] July 13, 1993 Etscheidt and [T]aylor [were] granted a right of way [sic] access.

We are both asking only for reasonable access to our properties and reasonable applys [sic] to winter access also.

We turn now to a consideration of the issues raised by Appellant on appeal and to a review of BLM actions complained of by Appellant. Appellant's complaint leads first to a consideration of the effect that a NORA has on the segregation of selected lands in a BLM land exchange. Second, we will examine Appellant's Purchase and Sale Agreement and the chronology of the land exchange to determine if a binding agreement existed. Third, our inquiry will examine the regulations governing discretionary grants of rights-of-way as well as the nature, terms, and conditions of COC-54319.

1. The Effect of a NORA on the Segregation of Selected Lands in a BLM Land Exchange.

On January 24, 1992, the BLM published in the Federal Register a NORA, enumerated COC-53540, which identified parcels of public land in Boulder, Fremont, and Park Counties, Colorado, suitable for disposal by exchange under section 206 of FLPMA of 1976, 43 U.S.C. § 1716 (1994). ^{4/} Among the parcels of public land identified for exchange was the 40-acre parcel designated T. 49 N., R. 12 E., sec. 18, NW~~4~~NE~~4~~.

After listing the parcels of public land identified for exchange, the NORA identified 1,390 acres of private land to be acquired by the United States "from Shepard and Associates" in exchange for the public lands identified in the NORA. 57 Fed. Reg. 2925 (1992). The NORA asserts that "[t]he purpose of the exchange is to obtain private land containing important riparian, wildlife, recreation and other public values, while disposing of scattered parcels of public land which are scattered, difficult to manage tracts without public access." After asserting that the "proposed exchange is consistent with the objectives of the land use plan for the affected lands," and stating that "[any] differences in the appraised values of the offered and selected lands will be equalized through acreage adjustments or cash payment," ^{5/} the NORA solicits

^{4/} Realty Action; COC-53540 Exchange of Private Lands in Park and Fremont Counties for Public Lands in Boulder, Fremont, and Park Counties, Colorado, 57 Fed. Reg. 2925-2926 (1992).

^{5/} As terms of art, offered lands refer to those offered to the United States by a private party in exchange for selected lands, that is, lands selected for disposal by exchange by the United States.

written comments by interested parties "on or before March 9, 1992." 6/
The following Supplementary Information concludes the NORA:

The exchange will involve both the surface and subsurface estates and will be subject to valid existing rights on both the offered and selected lands. This notice segregates the public lands described above from entry under the public land laws, including the mining laws, but not from exchange pursuant to section 206 of the Federal Land Policy and Management Act of 1976, for 2 years from publication or until patent issues. Any adverse comments will be evaluated by the District Manager who may vacate, modify, or continue this realty action and issue a final determination.

On September 3, 1992, BLM published in the Federal Register a supplement to three NORA's: COC-53506, COC-53540, and COC-44110. 57 Fed. Reg. 40469 (1992). The supplementary notice announced that the three realty exchange proposals under consideration "need additional or alternate public land in order to equalize values so the exchange can be completed."

Additional parcels of Federal land, aggregating approximately 1,600 acres, are described in the supplementary NORA and identified "as suitable for disposal by exchange under section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1716." Members of the public are invited to submit written comments on the proposed selections on or before October 19, 1992. Language describing the purpose of the exchange as well as language used to supply supplementary information is similar to that used in the NORA of January 24, 1992.

Specific requirements for the content of NORA's offering to exchange selected public lands are specified by regulation at 43 C.F.R. Subpart 2201. 7/ Regulation 43 C.F.R. § 2201.1(b) reads as follows:

6/ The record shows no written comments received in response to the NORA of Jan. 24, 1992.

7/ Regulations at 43 C.F.R. § 2201 implementing the exchange provisions of section 206 of FLPMA and in effect at the time of the publication of the NORA's of Jan. 24, 1992, and Sept. 3, 1992, were published at 46 Fed. Reg. 1638 (Jan. 6, 1981) and amended at 48 Fed. Reg. 16888 (Apr. 20, 1983). Pursuant to enactment of FLPMA, the Department of the Interior published final regulations implementing section 206 exchange procedures for the public lands effective Feb. 5, 1981. 46 Fed. Reg. 1638 (Jan. 6, 1981). The regulations were amended "to modify appraisal procedures and provide segregation of public lands subject to exchange," effective May 20, 1983, 48 Fed. Reg. 16888 (Apr. 30, 1983). In 1988, Congress amended FLPMA exchange provisions by enactment of the Federal Land Exchange Facilities Act of Aug. 20, 1988 (FLEFA), Pub. L. No. 100-409, 102 Stat. 1086. Among the FLEFA provisions amending section 206 is the following:

"(f) (1) Within one year after August 20, 1988, the Secretaries of the Interior and Agriculture shall promulgate new and comprehensive rules and regulations governing exchanges of land and interests therein pursuant to this Act and other applicable law. Such rules and regulations shall fully

The publication of the [NORA] on an exchange proposal in the FEDERAL REGISTER may segregate the public lands covered by the [NORA] to the extent that they will not be subject to appropriation under the public land laws, including the mining laws. Any subsequently tendered application, allowance of which is discretionary, shall not be accepted, shall not be considered as filed and shall be returned to the applicant, if the notice segregates the lands from the use applied for in the application.

The segregative effect of the [NORA] on the public lands shall terminate upon issuance of patent or other document of conveyance to such lands, upon publication in the FEDERAL REGISTER of a termination of the segregation or 2 years from the date of its publication, whichever occurs first. Any prior reserved Federal interest in the non-Federal lands may be segregated by the [NORA] to the same extent the public lands are segregated.

Regulation 43 C.F.R. § 2201.1(d) specifies requirements for the listing of reservations in the NORA:

The [NORA] shall list all reservations to be included in the conveyance to and from the United States, including, where the Federal lands are encumbered by a mineral lease or permit, a reservation to the United States for the duration of the mineral lease or permit or the mineral or minerals covered by the lease or permit.

Appellant's SOR on appeal shows that on January 26, 1992, Appellant and his wife entered into a Purchase and Sale Agreement with Escrow Instructions with Shepard and Associates, a Colorado general partnership, for the purchase of the tract. (Appellant's SOR, Exhibit B.) Page two of the Purchase and Sale Agreement, recites the contingencies affecting the land purchase envisioned by the parties:

SELLER, BUYER, and ESCROW AGENT understand that:

(1) This sale and escrow is in furtherance of and is contingent upon the consummation of a multi-party

fn. 7 (continued)

reflect the changes in law made by subsections (d) through (I) of this section and shall include provisions pertaining to appraisal of lands and interests therein involved in such exchanges."

As amended Pub. L. No. 100-409, § 3(a), Aug. 20, 1988, 102 Stat. 1087, 1092.

Final regulations implementing the changes enacted in FLEFA were promulgated Nov. 18, 1993, and became effective Dec. 17, 1993. 58 Fed. Reg. 60918 (Nov. 18, 1993). Thus, the regulations applicable in the instant case are those in effect on the day the action under appeal was taken; July 12, 1993. These regulations are codified at 43 C.F.R. Subpart 2201--Exchanges: Specific Requirements (1992).

land exchange with the U.S. Bureau of Land Management or other agency of the United States Government, herein called 'U.S. BUREAU OF LAND MANAGEMENT land exchange,' which exchange involves the described property. Buyer acknowledges and understands that Seller does not currently own the subject property and that upon execution of this agreement, Seller will attempt to acquire said property in the course of a multi-party land exchange for resale to Buyer. Seller agrees if Seller acquires said property, in the course of said multi-party land exchange, Seller shall convey said Property to Buyer pursuant to terms and conditions set forth herein.

At the execution of the agreement, buyer paid seller \$2,000 in earnest money towards the purchase price of the property. The agreement further stipulated that the appraised fair market value of the property would be determined by an appraiser qualified and accepted by the BLM, and that the agreement would remain in force only if BLM, buyer, and seller agreed on the appraised fair market value of the property sought by buyer. The parties further agreed that if the appraised fair market value of the property was found to be more than \$500 per acre, buyer could refuse to go forward and his earnest money would be refunded to him by seller. (SOR, Exhibit B, at 2.)

Appellant now appeals the grant of the right-of-way to holders Etscheidt and Taylor and argues that he was not informed of the grant until it had been accepted and signed by BLM and the holders Etscheidt and Taylor and that the right-of-way impairs his ownership rights in the property, which he received in fee by patent No. 05-93-0038 on July 20, 1993.

In his SOR, Appellant alleges that the BLM, after entering into a real estate purchase agreement with him on January 16, 1992, 8/ acted wrongfully by further encumbering the subject real estate, when it issued on July 13, 1993, an access right-of-way to two adjacent landowners without notice to him as purchaser, thus diminishing the merchantable title he had contracted for in the purchase agreement. Appellant's SOR identifies BLM as "Seller" and Appellant as "Buyer."

8/ While the agreement designated SALES AND PURCHASE AGREEMENT WITH ESCROW INSTRUCTIONS, escrow No. S-0662-CC, is dated Jan. 16, 1992, it was not executed until signed by David A. Carrick, General Partner representing seller, and Appellant and his wife. No date is given for seller's signature. Appellant and his wife signed and dated the document on Jan. 26, 1992. On the agreement below the signatures of seller and Appellant and his wife as buyers, the seller's escrow agent signed and dated, on Feb. 4, 1992, a statement asserting that "[e]scrow agent agrees to execute these Escrow Instructions."

An examination of Appellant's contractual agreement for the acquisition of the subject 40-acre parcel of public land reveals that his agreement was not with the BLM, but with a land sales company acting to facilitate an exchange of certain private lands for certain parcels of Federal land considered less desirable for management by BLM. On January 26, 1992, Appellant and his wife, known as buyers, entered into a sales and purchase agreement, with escrow instructions, with a Colorado general partnership, Shepard and Associates, known as sellers, which in turn employed an entity known as Chicago Title of Colorado, Inc., as escrow agent. 9/ Under the terms of the sales and purchase agreement, seller was to acquire, pursuant to the consummation of a multi-party land exchange with the BLM, a 40-acre parcel which under the terms of the land exchange would be transferred from Federal to private ownership.

The sales and purchase agreement provided that, at the time of execution by seller and buyer, buyer would remit to seller's escrow agent the sum of \$2,000 in earnest money towards the purchase price of the parcel. Seller agreed to convey the parcel to buyer pursuant to terms and conditions set forth in the agreement, and buyer agreed that

within fifteen (15) days after the date of the mailing of written request from Escrow Agent, [he would] deliver to Escrow Agent a duly executed certified check or money order or wired funds in the full amount of the sale price, less escrow deposit, payable to Chicago Title of Colorado, Inc.

(Sales and Purchase Agreement with Escrow Instructions, escrow No. S-0662-CC, Paragraph 3, at 3.)

Paragraph (4) of the sales and purchase agreement provides as follows:

Seller does hereby authorize Escrow Agent, upon the close of escrow, to deliver a duly executed United States Patent or warranty deed to Buyer, reserving unto the United States, its successors and assigns, all minerals including oil and gas rights owned by it and to said public land together with the rights of ingress and egress for the purposes of drilling, exploring for, producing, and removing same and, further, reserving unto the United States all encumbrances set forth in its United States Patent of the subject property. Prior to or at the time of the request for escrow deposit as required in paragraph 3 above,

9/ On July 8, 1993, Appellant's wife executed an assignment-of-interest to Appellant of "all right, title and interest she may have as Buyer pursuant to a Sales and Purchase Agreement with Escrow Instructions with Shepard and Associates, a General Partnership, * * * and Chicago Title of Colorado, Inc. * * * as Escrow Agent, dated July 6, 1993 and more specifically identified as S&P #S-0662-CC." The record does not include a copy of S&P #0662-CC, dated July 6, 1993.

Buyer shall be tendered a list of all encumbrances proposed in the United States patent or deed of the subject property. Deposit of the full sales price with the Escrow Agent by Buyer shall manifest his agreement to purchase the subject property subject to all such encumbrances. If any encumbrance provided in said list renders title to the property unmerchantable, and if Buyer elects to terminate this Agreement based on said encumbrances, Buyer shall notify Seller in writing within fifteen (15) days of receipt of said list of his termination of the contract. Any escrow deposit paid by Buyer shall be returned forthwith and all mutual obligations under the Agreement shall then terminate. Simultaneous with the Escrow Agent's delivery to Buyer of said deed or patent, Escrow Agent is authorized by Buyer to deliver to Seller the \$2,000.00 earnest money and the funds described in paragraph 3.

(Sales and Purchase Agreement with Escrow Instructions, supra, at 4 (emphasis added).)

Seller covenanted to make every reasonable effort to consummate a BLM land exchange involving the subject property, and buyer acknowledged no right-of-action against seller or escrow agent if, despite their reasonable efforts, the land exchange did not take place. (Paragraphs 5 and 6, Sales and Purchase Agreement with Escrow Instructions, supra, at 5.)

While acknowledging that "the provisions of this paragraph shall not constitute a defense to wanton and willful misconduct or misfeasance," seller and buyer covenanted to "indemnify and save harmless Escrow Agent fees, against all costs, damages, expenses and liabilities, including attorney's, which it may incur or sustain in connection with these instructions." (Paragraph 7, Sales and Purchase Agreement with Escrow Instructions, supra, at 5.)

An examination of the contractual relations between buyer, seller, and seller's escrow agent, as defined in the Sales and Purchase Agreement with Escrow Instructions signed by Appellant, his wife, and a general partner acting for seller on January 26, 1992, reveals that Shepard and Associates, as seller, were to provide Appellant with a list of all encumbrances "proposed in the United States patent or deed of the subject property" before or at the time of the remittance of the remainder of the cost of the property. Nevertheless, BLM, as titled owner, had not granted any right-of-way or other encumbrance at the time of the final remittance, July 8, 1993. The Appellant was nevertheless informed by faxed document and verbal statement of Mr. Parker of BLM on July 8, 1993, that a right-of-way had been granted, but that it was over an existing road. Appellant thus submitted his final payment for the property, properly believing that the right-of-way extended over the existing road across the northeast corner of the parcel. When Appellant subsequently learned the right-of-way had not been granted by BLM until July 13, 1993, and that it was not related to

the one existing road over the northeast corner of the property, he continued the closure under duress; he stated he believed that he would have no opportunity to purchase the property at a later date. (SOR, Exhibit A, at 2.)

Although BLM filed no initial appearance in this case, it responded on September 18, 1997, to this Board's August 12, 1997, Order to Show Cause why its Decision offering to grant the right-of-way at issue should not be reversed on the ground that BLM's violation of paragraph 4 of the Purchase and Sale Agreement rendered the subsequent grant null and void. In its Response, BLM stated, in pertinent part:

Of particular importance is the fact that Shepard and Associates (Shepard) is not a broker acting on behalf of the BLM. It is an exchange facilitator (facilitator).

* * * * *

The facilitator and the buyers execute a document which sets forth their relative rights and responsibilities. In this case, the document is identified as a "Sales and Purchase Agreement With Escrow Instructions." The BLM is not a party to the agreement between the facilitator and the buyers.

When the BLM determines that the value of the offered private land is equal to the value of the selected public lands, or determines that the values can be equalized pursuant to the provisions of Section 206 of FLPMA, the BLM and the facilitator begin an assembled land exchange. In an assembled land exchange, the facilitator conveys the offered private land to the BLM in exchange for the selected public land parcels, which it then sells to the buyers.

Because an assembled land exchange usually involves multiple parcels of public land which the facilitator ultimately sells to individual buyers in separate transactions, the facilitator frequently uses an escrow agent to consolidate the money the facilitator will receive from the sale of the public land parcels. The escrow agent also holds the warranty deed conveying the private land from the facilitator to the United States. When sufficient funds are deposited in the escrow account to equalize the values of the offered private land and the selected public land, the escrow agent disburses patents to either the facilitator or the individual buyers and releases the warranty deed to the private land to the United States. In this type of transaction, the facilitator is retained by the buyers, is paid a commission by the buyers, and is the agent of the buyers.

(Response at 1-2.)

In its Reply filed with this Board on September 22, 1997, Appellant states, in pertinent part:

The BLM raises only one defense to Carlson's claim that the BLM conveyed to him title to land that did not conform to the contract. The BLM makes the absurd claim the so-called "facilitator" who signed the contract, Shepard and Associates, (hereafter "Shepard") was actually an agent of Carlson.

Apparently the BLM wants this Board to believe Carlson contracted with himself for the purchase of the land. As strange as this concept may appear to the BLM, unless the owner of the land or its agent is a party to the contract, then there is no contract to purchase real estate. Nothing is more obvious than the fact Shepard was the BLM's actual and apparent agent for purposes of this real estate transaction. An agent's actions and knowledge, by law, bind its principal (the BLM) if the agent acted within the scope of his authority. In Re Stat-Tech Securities Litigation, 905 F.Supp. 1416 (D. Colo. 1995).

THE AGENCY

Shepard is obviously the BLM's agent. First, it is identified as "Seller" in the contract (page 1). Carlson is the "Buyer". The contract states Seller did not own the land in question (page 2). Therefore, it must have been acting as the owner's (i.e., BLM's) agent. Second, it was charged by the BLM to complete a BLM land exchange involving the subject real estate (page 2 of the contract and Mr. Deike's letter dated September 9, 1997, attached to the BLM's Response). Third, it was charged by the BLM to convey the subject real estate to Carlson (page 2). Fourth, the contract provided the agent was to provide Carlson a deed, or other evidence of title (page 5). Only the owner or the owner's agent can convey good and sufficient title.

Therefore, Shepard was acting for and on behalf of BLM. The BLM is as much a party to the contract as is Carlson. For the BLM to attempt to hide behind the conduct of its agent does not absolve it from failing to deliver to Carlson the title for which Carlson contracted.

Moreover, the local BLM office is being disingenuous with the IBLA when it claims it was not "aware of the specific terms of the contract." This form contract was provided Carlson by Shepard and surely is the same or similar form used in all such land exchanges. But even if the BLM did not know the terms of the contract, it is bound by those terms because Shepard was acting for the BLM in consummating the land exchange. "Notice to an agent for the purchase of land of facts affecting the title is binding on its principal." U.S. v. Hill, 217 F. 841 (D. Colo. 1914).

CONTRACTUAL INTERFERENCE

What's more, even if one was to believe the BLM wasn't a party to the contract, it has essentially admitted that it tortuously interfered with the contract between Carlson and Shepard.

Shepard contracted to convey a certain title to Carlson. It was prohibited from doing so because the BLM unilaterally granted the easement and clouded the title before Shepard and Carlson closed the deal. This was an intentional act on the part of the BLM to interfere with the Shepard/Carlson contract. (See *Hein Enterprises v. San Francisco Real Estate Investors*, 720 P.2d 975 (Colo. App. 1985)).

(Reply at 1-2.)

In this land transaction, only BLM was empowered to grant a right-of-way to land titled to the United States. 43 U.S.C. § 1761(a) (1994). In our review of the record, there is a question whether BLM made a reasoned analysis of the application for right-of-way as required by 43 C.F.R. § 2802.4. A fair reading of the case file reflects that BLM granted the application for the right-of-way under appeal on July 13, 1993, after Appellant had paid the full purchase price. The right-of-way was issued upon application to BLM by Ms. Taylor and Mr. Etscheidt, without notice to Appellant, although Appellant had filed his application to purchase the property prior to January 1992, and had completed payment on July 8, 1993.

The record indicates Appellant had previously advised these applicants that he would oppose a right-of-way, and that other means of access were available. Subsequently, Taylor and Etscheidt applied to BLM for the right-of-way on October 6, 1992, without notice to Appellant, in an application which claimed the right-of-way followed an existing road through the property being acquired by Appellant.

There is also a statement signed by Taylor and Etscheidt in the case file, undated, that claims the easement traverses a preexisting road. Appellant denies these claims in his SOR. 10/ Moreover, his denial is

10/ Appellant denies that a north-south access road exists across the 40-acre parcel. (SOR, Exhibit A, at 1.) The record, as supplemented on Sept. 12, 1996, by BLM, (see Footnote 4), contains an undated statement with five handwritten names appended, addressed "To whom it may concern:"

"I Eunice Taylor know the access road across the 40 acres NW¼ NE¼ of section 18, T.49 N., R.12 E., N.M.P.M., Colorado.

"This access road has been used I know for 33 years, as we owned the deeded land around it.

"We used the road to get in to fix fence, put out salt for cattle * *

supported by the BLM description of the property. The description of the property upon which the appraisal was based and upon which the full purchase price was paid contains no description of an existing road traversing the 40-acre parcel in the manner represented in the right-of-way.

[1] While approval or rejection of a right-of-way application is committed to BLM's discretion by section 501(a) of the FLPMA of 1976, as amended, 43 U.S.C. § 1761(a) (1994), it is well established that a decision on an application may be affirmed on appeal only where the record demonstrates that it was made after a reasoned analysis of all relevant factors, with due regard for the public interest. See Nevada Power Co., 137 IBLA 328, 332 (1997). Thus, 43 C.F.R. § 2802.4(d)(4) requires the authorized BLM officer to take all those actions, in considering an application for right-of-way, "necessary to fully evaluate and make a decision to approve or deny the application and prescribe suitable terms and conditions for the grant or permit." Id.; see, e.g., SMR Network, 131 IBLA 384, 386 (1994); Glenwood Mobile Radio Co., 106 IBLA 39, 41-42 (1988).

In addition, when adjudicating conflicting applications which require BLM to exercise its discretion to determine whether approval of a right-of-way is in the public interest, it is an error to approve a right-of-way application without notice to the conflicting land exchange applicant, and without providing an opportunity for the land exchange applicant to be heard. Nevada Power Co., *supra*, at 331; see also Ashbacker Radio Corp. v. Federal Communications, 326 U.S. 327 (1946). This doctrine has been applied by this Board to adjudications involving mutually exclusive conflicting applications. E.g., State of Alaska, 40 IBLA 79 (1979). The application of this principle has not been limited to cases involving a statutory right to an evidentiary hearing before an administrative law judge (ALJ). See, e.g., Nevada Power, *supra*, at 332. Thus, in Nevada Power, *supra*, this Board remanded to BLM a decision to reject a right-of-way application in the discretion of BLM where the BLM decision failed to reflect any analysis of relevant factors to determine what is required in the public interest. Similarly, in Havasui Heights Ranch and Development Corp., 94 IBLA 243 (1986), we remanded the case to BLM for adjudication of the conflicting claims with opportunity for protest and appeal.

In this case, however, BLM argues it is not a party to the Agreement because Shepard and Associates (Shepard) is not a broker acting on behalf of BLM, but is an "exchange facilitator" acting as agent for Appellant.

fn. 10 (continued)

"The reason the road exists where it is because it follows the ridge of the lay of the land and does not drift shut in the winter, thus making [sic] it the most resonable [sic] access the year round.

"The under signed [sic] also state they knew and used the road * * *." The following names are handwritten on the paper: Eunice E. Taylor, Dawson (?) Reid(?), Allan Ellison, Letha Latham, George Anderson.

Moreover, BLM asserts that Appellant elected to proceed with the closing despite the right-of-way grant after he had been advised by Shepard and BLM that he had the choices of canceling the Agreement, having his money refunded, delaying the purchase until a later date, or proceeding with the purchase.

[2] The record in this case also reflects that the right-of-way was not considered in the appraisal of the property Appellant was seeking to purchase. The general standard for reviewing appraisals is to uphold the appraisal if there is no error in the appraisal methods used by BLM, or the Appellant fails to show by convincing evidence that the charges are excessive. Clinton Impson, 83 IBLA 72 (1984). After carefully reviewing the record in this case, however, we conclude that there may have been a decrement in value created by a bisecting 1,400-foot right-of-way in favor of contiguous landowners that was not considered in the appraisal of parcel 7 purchased by Appellant.

In the referral of this matter to the Hearings Division, we do not intend to limit either the scope of the parties' presentations or the ALJ's inquiry at the hearing. We find it appropriate, however, to state those issues that should be addressed in order for the parties to better prepare.

A determination should be made concerning the role of Shepard, and whether it acted as BLM's agent. Second, it should be determined whether BLM's grant of the right-of-way was appropriate and consistent with law and regulation, whether BLM afforded Appellant adequate notice of the right-of-way, and whether Appellant knowingly waived any right to challenge BLM's decision on the right-of-way or its valuation of parcel 7 by proceeding with the closing.

Accordingly, pursuant to the authority delegated to the Board of Land appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is set aside, and the case is referred to the Hearings Division for assignment to an administrative law judge who shall conduct an evidentiary hearing and issue a decision addressing the above issues of fact, and all other relevant issues of fact and law. In the absence of a timely appeal to this Board, the decision of the administrative law judge shall be final for the Department.

James P. Terry
Administrative Judge

I concur in the result:

John H. Kelly
Administrative Judge